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No. 955

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 94–97) are reported at 6 Wage Hour Rept. 1117. The opinion of the Circuit Court of Appeals (R. 125–127) is reported at 145 F. 2d 349.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 10, 1944 (R. 127). A petition for rehearing was denied December 26, 1944

(R. 136). The petition for a writ of certiorari was filed March 17, 1945 and granted April 2, 1945. The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employer who is in fact paying his employees piece rates yielding earnings of about 59 cents an hour[1] is excused from paying additional compensation for overtime calculated upon these earnings, by a contract which recites that 35 cents an hour is the "regular rate of pay" and "guarantees" earnings at the piece rates for "regular time and such overtime as the employee may work".

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201) are as follows:

> Sec. 7 (a): No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> "(3) For a workweek longer than forty hours after the expiration of the second

[1] The average hourly piece work earnings have been calculated from the actual earnings of respondent's employees for the weeks between April 1, 1943, and the date of the trial, shown in Plaintiff's Exhibit No. 1 (R. 119–121).

year from * * * [the effective] date [of this section],"

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent, a Tennessee corporation, is engaged at Samson, Alabama, in manufacturing lumber for shipment in interstate commerce (R. 94, fdgs. 1–2). In the production of the lumber it employs a number of "stackers" who are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act (R. 11–13).

Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work. Thus, respondent made no provision for paying for overtime hours at one and one-half times the regular rate of pay as required by Section 7 (R. 95–96, fdgs. 6–7, 9).

During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that its method of employing the stackers violated the

overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced,[2] continued to employ the stackers during overtime hours without compensating them at one and one-half times their regular rate of pay. Between April 1, 1943, and the date of the trial September 22, 1943, the stackers worked a total of 134 man-weeks. During 34 of those weeks they worked overtime (R. 119–121; cf. R. 96, fdg. 9), again without added compensation.

On the day before the trial respondent entered into elaborate agreements with its stackers, signed with a mark by each of the illiterate employees (R. 108–109). These contracts provided that—

> The basic or regular rate of pay is 35 cents per hour for the first forty hours each week[3] and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> The amount of stacking done by said employee shall be figured on the basis of 80¢

[2] The complaint in this action was filed on March 17, 1943 (R. 1).

[3] At that time the wage order issued by the Administrator for the timber products industry fixed the minimum wage at 35 cents an hour (R. 14).

per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

When these agreements were signed, the explanation given to the stackers was that they would continue to be paid piece rates per thousand board feet just as before, but at the higher rates specified in the contracts. There was no evidence that the stackers understood that the agreement was intended to fix the hourly rate for the purposes of the Fair Labor Standards Act at 35 cents an hour rather than at the average hourly earnings of about 59 cents yielded by the new piece work rates. (R. 63–65.)

From April 1, 1943, until the trial the stackers were paid piece rates of 60 and 70 cents per thousand. During this period they earned at those rates an average of 51 cents an hour (see n. 1, *supra*). At the new rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours, well above the 52½-cent overtime rate which would come into operation during weekly overtime hours if the "regular rate" of 35 cents had real meaning. Hence the new contract, if effective, would enable respondent to pay the specified piece rates uniformly during all hours worked, without higher rates for overtime employment.

The District Court ordered that the complaint be dismissed (R. 97). On appeal, the Circuit

Court of Appeals affirmed the judgment, holding (R. 127)—

> On the day before the trial a new contract had been entered into between the defendant and the stackers, which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant ceased to employ stackers on the basis complained of. Moreover, it was manifest that the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations.

On December 26, 1944, the Circuit Court of Appeals denied a petition for rehearing (R. 136).

SPECIFICATION OF ERRORS

1. The court below erred in holding that the defendants' contracts with the employees in question, entered into the day before the trial, whereby the "regular rate" for computation of overtime premium was asserted to be an hour instead of the employees' hourly piecework earnings, are not in violation of Section 7 of the Fair Labor Standards Act.

2. The court below erred in holding that for this reason no injunction should issue to prohibit future violations and in affirming the judgment of the District Court.

ARGUMENT

I

PAYMENT ACCORDING TO THE STACKERS' CONTRACTS OF EMPLOYMENT WOULD VIOLATE SECTION 7 IN WEEKS IN WHICH OVERTIME WAS WORKED

Under the decision in *United States* v. *Rosenwasser,* 323 U. S. 360, it is clear that Section 7 of the Fair Labor Standards Act applies to piece work employees as well as hourly workers and the words "the regular rate at which he is employed" cover not only hourly rates but also other measures of work and compensation such as "piece rates" or "job prices". See also *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 579, n. 15. Consequently, respondent must compensate its stackers for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed, even though the applicable piece rates may yield enough each week to cover the minimum wage prescribed by Section 6 plus one and one-half times the minimum for overtime. "The Act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum" (*Overnight Motor Co.* v. *Missel, supra,* at 578).

This requirement does not straitjacket respondent by requiring it to put its piece workers on hourly rates. Respondent may continue to pay piece work rates and comply with Section 7, as it

is now administered, in either of two ways. One method is to pay the established piece rates for all hours worked, including the overtime hours, and then to translate them into an average hourly rate by dividing the number of hours worked into the total compensation paid at the piece rates. One-half the hourly rate thus obtained is then multiplied by the number of hours of overtime. The result is the extra compensation which must be paid to the piece workers in order to comply with Section 7.[4] Thus, under this method the piece work earnings are "translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled" (*United States* v. *Rosenwasser, supra,* 364).

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[4] See Interpretative Bulletin No. 4, par. 8: "Where an employee is employed on a piecework basis, his regular hourly rate of pay is computed by dividing the total weekly piecework earnings (including production bonuses, if any) by the number of hours worked in the week. For his overtime work the pieceworker is entitled to be paid a sum, in addition to his weekly piecework earnings, equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. Thus if the total piecework earnings in any workweek of 46 hours are $23, the regular hourly rate of pay is 50 cents. For the 6 hours of overtime, the employee is entitled to $1.50 (6 hours x 25 cents) additional compensation; for the week's work he is entitled to a total of $24.50. In other words, since the regular hourly rate of pay is 50 cents an hour, the employee is entitled to be paid an amount equal to 50 cents an hour for 40 hours and 75 cents an hour for the excess 6 hours, or a total of $24.50."

A second method which the Administrator, as a matter of enforcement policy, has accepted as constituting compliance, is to raise the piece rates 50 per cent during the overtime hours. For example, since respondent pays its stackers 70 cents a thousand board feet for ricking and 80 cents a thousand for stacking during their first 40 hours of work, it can comply with Section 7 by paying $1.05 and $1.20 a thousand during overtime hours.[5]

Respondent has refused to follow either of these alternatives. Until the day before the trial it persisted in paying its stackers constant piece rates of 60 and 70 cents a thousand during all

[5] The Administrator has never been certain that this second method of payment is in strict compliance with the Act, and the Court's statement in the *Rosenwasser* case (p. 364) that piece work earnings must be reduced to an hourly basis for the purpose of determining compliance would seem to indicate, if read literally, that payment of one and a half times the applicable piece rate for each piece of work done during overtime hours would not constitute compliance with Section 7 if the employee completed fewer pieces during each hour of overtime than during each of his first 40 hours of work. On the other hand, the Court's statement can be read to refer only to Section 6; and the Circuit Court of Appeals for the Seventh Circuit has held that to pay one and one-half times the piece rates is sufficient. *Walling* v. *Stone*, 131 F. 2d 461, 464 (C. C. A. 7). Moreover, whatever the strictly correct rule of law may be determined to be, this second method of computing overtime is more practicable under some circumstances than to translate the piece rate earnings to an hourly basis, and it ordinarily results in substantial compliance with Section 7. In view of all these circumstances, the Administrator, in enforcing the Act, treats both methods of computing overtime as compliance.

hours of employment.* Since the stackers often worked more than 40 hours a week—one-fourth of the man-weeks between April 1, 1943, and the day of the trial included overtime (R. 119–121)—but were never paid any extra compensation for the overtime hours, this was a plain violation of Section 7. *United States* v. *Rosenwasser, supra.*

The contracts executed the day before the trial did not alter this arrangement. Their sole purpose was to legalize and preserve it. Respondent "guaranteed" that as in the past it would pay the specified piece rates, yielding about 59 cents an hour, uniformly for all hours of work and provided that these payments should be deemed to include compensation for overtime at not less than one and one-half times the rate of 35 cents an hour, which was labeled the "regular rate of pay". Obviously, the 35-cent rate was not the basis of the stackers' normal, non-overtime compensation, which was determined by the piece rates actually paid, but was simply an artificial, fictitious rate amounting to only 60 percent of the actual hourly

* In its Brief in Opposition respondent made much of the concession in the Administrator's brief in the Circuit Court of Appeals that this was done in good faith. The point which was conceded was that respondent was acting on the advice of counsel, without fraud or concealment, and probably in the honest belief that the new contracts were valid under *Walling* v. *Belo Corp.*, 316 U. S. 624. There is no inconsistency between this concession and the obvious fact that respondent has been seeking at all times to circumvent the policy of Section 7 and pay constant piece rates for all hours of work.

rate of pay. This so-called "regular rate" was never actually paid. It was not intended or used for any other purpose than to avoid the payment of true overtime compensation.

The record establishes this fact in three ways: First, respondent's counsel admitted at the opening of the trial (R. 15)—

> We know, from past experience, that we will pay them more [than the hourly rates], because they will earn more money by stacking lumber.

Second, the figures for six weeks in 1942, selected by respondent as representative, show that even at the old rates of 60 and 70 cents a thousand board feet, the stackers earned 65 percent more than the 35 cent hourly rate and that on occasion they earned double that figure (Defendant's Exhibit 1, R. 106–107): Third, analysis of the payroll for the four months immediately preceding the trial shows that at piece rates 15 percent lower than the rates to be paid under the new contract the stackers were regularly earning 51 cents an hour (R. 119–121).

Since the piece rates are the only actual rates of pay, the requirements of Section 7 are not satisfied by payment of one and one-half times the fictitious 35 cent rate which the contract labeled "regular". In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the Court held that the term "regular rate" does not refer to some artificial rate which the parties choose to call the "regular rate" in

their contract and that overtime must be based "upon the wages actually received" during "the hours actually and regularly spent each week in working" (323 U. S. at 41). The opinion states (p. 40) that—

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This interpretation was reaffirmed in *United States* v. *Rosenwasser, supra,* at p. 363.

In the instant case the "rate actually paid for the normal, non-overtime workweek" is the piece rate of 70 or 80 cents an hour according to the nature of the work. Translated to an hourly basis under the formula approved in the *Rosenwasser* case, it averages about 59 cents an hour, the result obtained by dividing each stacker's piece rate earnings in a given week by the number of hours worked. Respondent, however, did not pay or propose to pay one and one-half times this rate for overtime. The stackers are to receive the constant piece rates for all hours worked and no extra compensation whatever during overtime hours. The arrangement set up by the new contracts, therefore, like that previously prevailing, is in plain violation of Section 7 as construed in the *Helmerich & Payne* and *Rosenwasser* decisions.

The Circuit Court of Appeals sustained the new contract on the ground that it "provided for time

and overtime, with a guarantee of additional pay based on the amount of lumber stacked" (R. 127). The underlying thought appears to be that the parties were free to agree in the employment contract that 35 cents an hour should be the "regular rate" for purposes of Section 7 even though the piece rates yielding 59 cents an hour were the actual rates of pay. But on this point, also, the opinion of *Walling* v. *Helmerich & Payne* is explicit (323 U. S. at 42)—

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Even before the *Helmerich & Payne* decision several lower Federal courts had held contracts to be invalid which were designed to enable the employer to pay the same wage during both regular and overtime hours. In *Carleton Screw Products Co. v. Fleming*, 126 F. 2d 537 (C. C. A. 8), certiorari denied because petition out of time, 317 U. S. 634, the court concluded that Section 7 cannot be circumvented by a contract dividing a constant hourly wage into a "regular rate of pay" and a "bonus" which is excluded from the computation of overtime. Similarly, in *Walling* v. *Green Head Bit & Supply Co.*, 138 F. 2d 453 (C. C. A. 10), the contract was held invalid because the employees received the same hourly wage during both regular and overtime hours under a provision reducing the "regular rate" whenever overtime was worked so that the "regular rate" plus "overtime" would result in the constant wage. In other cases, the principle was stated much as in the *Helmerich & Payne* decision. *Walling* v. *Fischer Lime & Cement Co.*, 7 Wage Hour Rept. 624 (W. D. Tenn.). See also *Walling* v. *Mueller Furnace Co.*, 50 F. Supp. 561, 562 (E. D. Wisc.); *Walling* v. *Livernois*, 50 F. Supp. 978 (E. D. Mich.); *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.). Under these cases, as under this Court's decision in *Walling* v. *Helmerich & Payne, Inc.*, the label used in a contract cannot be regarded as decisive and Section 7

must be read to refer to the actual rate at which the employees are regularly compensated.

On principle, also, it is clear that Section 7 must be read to refer to the actual rate of compensation established as a result of wage negotiations between employee and employer, rather than to a fictitious rate which the parties agree to label the "regular rate" without regard to the employees' actual compensation for non-overtime employment. Section 7 has two purposes: (1) to spread employment by making it more costly to employ a small number of workers in excess of 40 hours a week than it would be to employ a sufficient number to do the same amount of work in 40 hours; and (2) to secure extra compensation to employees for the burden of an overtime workweek. *Overnight Motor Co.* v. *Missel, supra; Walling* v. *Helmerich & Payne, Inc., supra.* To achieve these purposes, Section 7 provides that no employer shall employ any employee engaged in commerce or in the production of goods for commerce for more than 40 hours a week without compensating him for the overtime hours "at a rate not less than one and one-half times the regular rate at which he is employed". This provision obviously contemplates that employees and employers will agree upon the employees' normal compensation by individual or collective negotiations. Provided that the minimum hourly rates established under Section 6 are paid, the parties are entirely free to fix, and alter as they wish,

the method of compensation and the rate at which the employees will be employed during the regular, 40-hour workweek. After that rate is established, Section 7 comes into play and requires the employer to pay for any overtime hours a rate 50 per cent higher than the rate he pays for non-overtime employment under the contract of employment. In the present case, respondent and the stackers are free to agree upon the regular compensation for which the stackers will work, but after they have established as the actual basis of compensation the piece rates of 70 and 80 cents a thousand, yielding 59 cents an hour, they have no choice as to the application of Section 7 which makes it obligatory for respondent to pay rates 50 per cent higher during any overtime hours, *i. e.*, piece rates of $1.05 and $1.20 a thousand or 88½ cents an hour. In this way Section 7 operates to effectuate the legislative purposes: the employer's labor costs are increased 50 per cent at the end of the 40-hour week, which is an inducement to reduce hours of work and employ more labor; and the employees receive a 50 per cent premium during any overtime hours, which compensates them for the undue length of their workweek.

But the purposes of Section 7 can be easily frustrated and its incidence will be arbitrary and capricious if the words "regular rate" are to be interpreted to mean any rate which the parties may label the "regular rate of pay" in the em-

ployment contract. The dangers are illustrated by the present case. The contracts signed the day before trial plainly reveal that respondent and the stackers intended to, and did, fix piece rates of 70 and 80 cents per thousand as the actual rates of compensation at which the stackers would be regularly employed. Under the basic theory of Section 7, the wages paid by respondent should be increased 50 per cent in overtime hours to $1.05 and $1.20 per thousand board feet of lumber stacked, or 88½ cents an hour; yet if the "regular rate" for the purposes of Section 7 is the 35 cents an hour labeled as "the regular rate" in the contracts of employment, the respondent's labor costs will be constant throughout the workweek and the stackers will receive no overtime premium for overtime hours. Thus, under respondent's interpretation Section 7 is nullified by the simple device of labeling 35 cents an hour as "the regular rate of pay". The essential sanction of the Act would largely disappear and its effectiveness would be seriously impaired under this interpretation.

Respondent's interpretation, moreover, is inconsistent with the settled rule that the provisions of the Fair Labor Standards Act cannot be set aside by private contracts. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590; *Walling* v. *Helmerich & Payne,* 323 U. S. 37. Although respondent and the stackers were free to agree here upon the stackers' compensation for the normal, non-overtime workweek, they could not after

having made that bargain stipulate directly that the stackers should receive no premium for hours in excess of 40. "Private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions 'from the reach of dominant constitutional power'." *Overnight Motor Co.* v. *Missel, supra,* at 577. Equally, respondent and the stackers should not be free to set aside Sec a 7 by the more devious method of agreeing that the actual compensation shall be determined by piece rates yielding approximately 59 cents an hour but that nevertheless 35 cents an hour shall be treated as "the basic or regular rate of pay" in computing overtime compensation. For the latter provision is merely an express waiver of Section 7 cloaked in a different and somewhat more complicated form of words. *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 42.

Walling v. *Belo Corporation,* 316 U. S. 624, does not sanction such an arrangement. In that case the employer was not attempting to justify paying his employees the same piece rates without regard to hours worked, thus keeping wages and labor costs constant for both regular and overtime hours. The parties had agreed that the employees should be paid a regular hourly rate of 67 cents an hour and not less than one and one-half times that rate for overtime, but the employer had also guaranteed the employees a weekly "take home" or salary of at least $40. The Court did not, as

respondent argues, view as decisive the assertion in the contract that the regular rate was 67 cents an hour. It recognized that "the problem is whether the intention of the parties to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40" (316 U. S. at 631). And it concluded, for two reasons, that the former intention was not overridden by the latter. The first of these reasons was that, under the contract, when an employee worked more than 54½ hours in a single week, he was entitled to and did receive (over and above the $40 guaranty) compensation for each additional hour at one and one-half times 67 cents, the regular rate specified. "In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling" (316 U. S. 632).

The Court's second reason for concluding that the $40 guaranty did not override the provision of the contract which specified 67 cents as the regular rate of pay was this. Section 7 requires that overtime hours be compensated at *"not less than"* 150 percent of the regular rate; it does not prohibit paying more. Hence, the Court reasoned, the fact that when an employee worked less than 54½ hours a week his pay was determined by the $40 guaranty does not show that the 67-cent rate was inoperative in that week. "The question remains whether the $40 contemplates compensation for overtime as well as basic pay."

And the Court took the view that it did; that, for example, "if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44 x $0.67) plus $10.52 for the remaining six hours (6 x $1.753)." By this reasoning, the Court concluded that the basic straight time rate did not vary in workweeks of different length; that the fluctuation occurred in the amount of the premium for overtime (316 U. S. 632).

The *Belo* case has no application to the present case because no guaranty of a fixed weekly wage is here present. Even if respondent's reasoning (Br. in Opp., 12) were to be adopted, however, and assurance of a fluctuating weekly income determined by piece rates instead of the lower hourly rate were to be regarded as a valid substitute, it would still be necessary to ask "whether the intention of the parties to set [35] cents an hour as the regular rate squares with their intention" to apply the piece rates. (316 U. S. 631.) It is submitted that it does not; that the former intention is clearly overridden by the latter. In the first place, it is not true here as it was in the *Belo* case, that after an employee has worked a particular number of hours (54½ in the *Belo* case), the specified 35 cent "regular rate" will control the amount of his compensation. No matter how long an employee's workweek, his earnings are still determined by the piecework rates and by them alone. For, as we have shown, *supra*, pp. 5-11, the piecework rates yield average hourly earnings

of 59 cents an hour, whereas 150 percent of the 35 cent "regular rate" amounts to only 52½ cents. Neither the 35 cent nor the 52½ cent rate ever determines an employee's actual compensation. Secondly, on the facts of this case, it is clear that the guaranteed piecework earnings do not (as the Court in the *Belo* case concluded the guaranteed weekly salary did) "contemplate[s] compensation for overtime as well as basic pay" (316 U. S. at 632), with an invariant basic straight time rate and a fluctuating overtime premium. For the employees here involved work less than 40 hours in most workweeks (R. 119–121). In workweeks of 40 hours or less, the same piece rates are paid and piecework earnings are necessarily allocable wholly to basic, non-overtime pay; surplus earnings over and above the stipulated 35 cent hourly rate cannot be excluded in the calculation of the actual regular rate of pay by viewing them as part of the premium paid for overtime hours since there are no overtime hours. And if the piecework earnings are wholly straight-time compensation in the great majority of workweeks, it would obviously sanction evasion of the requirements of the Act to permit the parties to treat some part of those earnings as allocable to overtime premium in the relatively few workweeks in which overtime is worked.

The *Belo* case comes only to this: On the facts before it, the Court upheld the contracts because it took the view that they "were intended to, and did, really fix the regular rate at which each em-

ployee was employed" at 67 cents an hour (316 U. S. at 629–630). The Court's statement (p. 631) that "it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract" refers only to an agreement fixing the actual rate of pay. Nothing in that decision permits an employer to agree that for the purposes of Section 7 the "regular rate" shall be less than the actual hourly earnings, which in this case result solely from the stipulated piece rates in all workweeks.[7]

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[7] This has been the consistent position of the Administrator of the Wage and Hour Division. Interpretative Bulletin No. 4 (November 1938, revised November 1940), paragraph 25, gives the following illustration:

"An employee is now employed on a piece-rate basis. The employer will announce that henceforth the employee will be employed at an hourly rate of 30 cents an hour for 42 hours and 45 cents an hour for all hours in excess of 42, although the employee will continue to receive his full piecework earnings at the present piece rates. Obviously, 30 cents is not the regular rate of pay; it is not the rate at which the employee is actually paid. The case is no different if the employer adopts a rate in excess of the minimum. So long as the employer continues actually to pay at the piece rates now in effect, the regular rate of pay will be determined by dividing the piecework earnings by the hours worked each week, and the employee will be entitled to time and one-half that rate for hours worked in excess of 42 [40]."

Administrative interpretations of the Fair Labor Standards Act, although not issued as regulations under statutory authority, carry persuasiveness as an expression of view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application. *Overnight Motor Co.* v. *Missel, supra; Walling* v. *Helmerich & Payne, Inc., supra.*

II

THE BASIS FOR THE LOWER COURT'S CONCLUSION THAT AN INJUNCTION IS UNNECESSARY, NAMELY THAT THE NEW CONTRACTS OF EMPLOYMENT COMPLY WITH THE ACT, DISAPPEARS IF THESE CONTRACTS ARE ILLEGAL

In its Brief in Opposition (pp. 8–12) respondent argued that the courts below did not rule on the validity of the employment contracts executed the day before trial but denied the injunction as unnecessary to secure compliance with the Act. There is no merit in this contention. The opinion of the Circuit Court of Appeals fully discloses that its decision was predicated on a ruling that payment under the new contracts would meet the requirements of Section 7:

> On the day before the trial a new contract had been entered into between the defendant and the stackers, which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant ceased to employ stackers on the basis complained of. Moreover, it was manifest that the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations. (R. 127.)

The District Court's finding is in almost identical language. (R. 96.)

It is clear, moreover, that neither of the courts below could have denied the Administrator's prayer for relief without holding that payment under the new contracts would meet the requirements of Section 7. The complaint alleged that respondent was violating Sections 7 and 15 (a) (2) by employing its stackers on a piece work basis for more than 40 hours a week without compensating them for overtime at one and one-half times the regular rates at which they were employed, and prayed for an injunction restraining respondent from continuing to violate those provisions of the Act (R. 5–6). Upon proof of these allegations, the Administrator became entitled to the relief requested unless the court was satisfied that no future violations were threatened. The courts below denied an injunction because they were of the view that the new employment contracts meet the requirements of Section 7. Since, as we have shown, these agreements do not constitute compliance, an injunction must issue.

Respondent has also suggested that no injunction should issue because it does not appear that the stackers are now being employed for more than 40 hours a week. The evidence shows, however, that during 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7) and that between April 1, 1943 and the date of the trial, one-fourth exceeded 40 hours (R. 119–121; cf. R. 96, fdg. 9). Moreover, if overtime were not contemplated, there was no reason

for drawing the elaborate contracts the day before the trial in the effort to legalize the payment of constant piece rates for all hours. Respondent's action in securing these contracts is a plain indication that continued overtime work was contemplated and that payment of the stackers in accordance with the unlawful contracts was intended. Accordingly, an injunction should issue restraining violations of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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